No. 21532

IN THE

United States Court of Appeals

For the Ninth Circuit

MAUK SEATTLE LUMBER CO.,
Appellant,

v.

ALCAN PACIFIC CO.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a money judgment entered by the Honorable Raymond E. Plummer, sitting without a jury, rendered in favor of the appellee. The jurisdiction of the District Court was based upon diversity of citizenship under 28 U.S.C. 1332. Appellee was a corporation organized under the laws of the State of Alaska, with its principal place of business in Alaska. Appellant was a corporation organized under the laws of the State of Washington, with its principal place of business in Washington. The jurisdictional allegations of the complaint are found in Paragraph I thereof (R. 1), which allega-

tions were admitted in appellant's answer, Paragraph I (R. 50), and which were found by the court in Paragraph I of the Findings of Fact (R. 298).

The jurisdiction of the Court of Appeals is based upon 28 U.S.C. 1291. Final judgment for the appellee was entered on November 4, 1966 (R. 326) and Notice of Appeal was given by appellant on November 28, 1966 (R. 335).

STATEMENT OF THE CASE

In April, 1961, the appellee, Alcan Pacific Co., was awarded a contract with the United States Government to construct additional military housing at Ft. Greeley near Fairbanks, Alaska. The project included eight buildings, one building addition and associated utilities (R. 298-299, Finding No. 2).

The appellant Mauk Seattle Lumber Co., a lumber broker, undertook to supply the lumber and plywood requirements for the project (R. 299, Finding No. 3).

One item of these requirements was Type II 3/8-inch plywood siding, 1860 pieces, at a price of $6,249.60. This case involves only this Type II siding which is hereafter referred to as simply "siding" (R. 299, Finding No. 4).

The initial shipment of 1860 pieces of siding arrived at the jobsite in late May, 1961. The appellee's superintendent examined the shipment and admitted it then looked "very bad," but did not get a decision on the material from the Government Resident Engineer prior to commencing application in late June (Tr. 333). The Govern-

ment's prompt rejection of the siding on July 1st and a formal stop order on July 3rd were ignored and appellee continued to apply the material (R. 300, Finding No. 7). Much of appellee's claim involved this first shipment but the evidence showed, and the trial court found, that the parties entered into a settlement concerning this shipment (R. 300, Finding No. 8). The initial shipment is therefore not involved in this appeal, but the position in which appellee placed itself by its own conduct in failing to get immediate approval or rejection and in violating the stop order is significant.

After the settlement on the first shipment, 1300 sheets of plywood were required to complete the job (R. 300, Finding No. 8). These were supplied by appellant in subsequent shipments. *While portions of some subsequent shipments did not meet specifications, conversely each shipment contained usable sheets* (R. 301-302, Finding No. 41). *Faulty portions were in each instance replaced by the appellant. The evidence showed and the trial court also specifically found that there were sufficient good sheets in each subsequent shipment to keep ahead of the appellee's requirements as construction progressed and no delay could therefore be attributed to lack of suitable siding on the jobsite.* (R. 302-303, Finding No. 17).

With further findings that the project had been plagued by problems and delays caused by numerous other subcontractors, labor disputes, record weather extremes, a multitude of contract changes and numerous other causes in no way related to the siding (R. 306-308, Findings No. 28-29), and it appearing that the project was actually

on schedule up to the point where all siding was completed (R. 308-309, Finding No. 31), the trial court rejected the huge claims (prayer of complaint—$400,000.00, R. 2) of the appellee (R. 311, Finding No. 38).

This should have been the end of it.

But the court awarded $26,000.00 damages on its own complex formula—on a theory never advanced by appellee (R. 309-310, Findings No. 32-35). In order to understand the basis of the court's award and the faultiness of the court's reasoning in so doing, the following must be understood:

(a) The siding was ordered and supplied in standard 4' x 8' sheets. The eight buildings involved were of simple two-story construction, all of the same basic design (Exhibit H, Building Plans), and siding was to be applied in three rows or tiers with a minimum of cutting and piecing (Tr. 303-304). The upper row or tier covered the second story walls and took a full eight foot sheet. The middle tier or row covered the first floor walls and was also a full eight foot sheet. The third or lower tier covered the basement or foundation above ground and was approximately five feet high (Tr. 304).

(b) The trial court based its damage award on the premise that the appellee had to change its planned method of applying siding to the second floor walls on those four or five buildings which were completed with the 1300 sheets of the second and subsequent shipments (R. 309, Finding No. 22). Appellee alleged it originally intended to apply the siding to the second floor wall framing while it was lying flat on the second floor deck and

then tilt up or raise the framing and siding with hydraulic jacks. It further alleged it had to alter this plan, and while still raising the framing with jacks, it thereafter applied the siding to the erect second story walls, using men on scaffolding. In any event, this tilt-up method of siding application involved only the second floor siding or one-third of the siding on these buildings (Tr. 305). The remaining two-thirds of the siding to go on the first floor and basement walls was to be installed in exactly the same way under either method.

(c) The only comparison between cost of the two alleged methods of applying this second story siding was a speculative opinion of appellee's superintendent that the latter cost three times as much as the former (Tr. 247-248).

(d) There was no evidence offered as to the time (man hours) or cost of either method allegedly used to *apply* siding, hence nothing to which this cost comparison could be applied. The only evidence even remotely related was an estimate of the time required to *remove and reapply* a sheet of siding on a previously sided building. This was an estimate of *three man hours* per sheet to so *remove and replace* (Tr. 331-333).

Keeping the foregoing in mind, examine the damage award of the trial court as set forth in Findings of Fact No. 32 through 35 (R. 309-310).

> "32. Plaintiff's plan of work provided that the plywood on the *second story* be applied to the framing while it was lying on the deck in a horizontal position. Thereafter the wall sections were to be raised

to a vertical position by the use of hydraulic jacks. This technique accelerated construction and was an economical method of erecting the *second floor framing and siding*. Buildings 846, 847 and 848 were constructed in this manner. By reason of the fact that the plywood siding supplied by defendant did not meet contract specifications, it became necessary for plaintiff to revise its plan of work by erecting the framing and thereafter applying the plywood siding by craftsmen working from scaffolding. *As a result of this change in the plan of work the cost of applying a sheet of plywood siding was increased about three times.*

"33. There remained, at the time of this change of plans, approximately 1300 *sheets of plywood siding* to be applied. *It required approximately 3 man hours per sheet to apply a sheet of plywood siding* to the end of a building. This is the best comparison appearing in the record for placing siding on the side of a building. The cost to plaintiff to keep a workman on the job was approximately $10.00 per hour.

"34. The court finds that the *cost of applying the remaining* 1300 *sheets of plywood siding under the revised work plan* was approximately and reasonably $39,000.00, computed as follows:

"$10.00 per man hour per workman.

"3 man hours—$30.00 per sheet.

"1300 sheets x $30.00—$39,000.00.

"35. Plaintiff's overall increased cost resulting from this revision in plans was approximately and reasonably two-thirds of $39,000.00 or $26,000.00."

NOTICE WHAT THE TRIAL COURT HAS DONE HERE—IT HAS TREATED ALL 1300 SHEETS AS SECOND FLOOR SIDING, whereas only ONE-THIRD of the 1300 sheets, or a maximum of 433 sheets could

be affected by a change in method of applying second floor siding. The remaining two-thirds were required to cover the first floor and basement walls. Also, if it takes at most three hours to *remove and replace* a sheet of siding, no more than half that time could be justified for *applying only*. Hence the trial court's formula for cost should not exceed:

$10.00 per man hour per workman.
1.5 man hours—$15.00 per sheet.
433 sheets x $15.00—$6,500.00.

Apportioning two-thirds of this cost to damages results in a maximum award of $4,333.00—not $26,000.00.

Actually, however, it had already been clearly established that appellee was not forced by siding considerations to alter its method of application. Adequate siding was always available at the job to be applied by appellee in any method it saw fit (R. 303, Finding 17).

ASSIGNMENTS OF ERROR

Appellant contends the District Court erred in the following respects:

1. The court erred in its Finding of Fact No. 32 wherein it held that (a) appellee revised its plan of erecting the second story walls "by reason of the fact that the plywood . . . did not meet specifications" and (b) that as a result of this change the cost of applying a sheet of siding was increased about *three times.*

2. Error is further assigned to Finding of Fact No. 33

wherein the court held that "It required approximately three man hours per sheet to *apply* a sheet of plywood siding. . . ."

3. Error is assigned to Finding of Fact No. 34 wherein the court found a total cost of placing 1300 sheets of plywood to be 3 man hours per sheet x $10.00 per man hour x 1300 sheets, or a total of $39,000.00.

4. Error is assigned to Finding of Fact No. 35 wherein the factor of "three times" described in Finding of Fact No. 32 (Assignment of Error 1 above) is used to impose two-thirds of the $39,000.00 cost figure on appellant, thereby finding appellee damaged in the sum of $26,000.00.

5. Error is assigned to Conclusion of Law No. 4 where appellee is found to be the *prevailing party* and entitled to attorneys' fees.

6. Error is assigned in the award of costs to appellee, because the only purported cost bill filed within the time allowed by the court rules, asking for the sum of $12,870.04, was not a compliance with court rules and should have been stricken as frivolous.

ARGUMENT FOR THE APPELLANT

1. Summary of Argument:

The following basic points will be established in this argument:

A. No revision of the erection plan of appellee could have been the fault of appellant, because the evidence

showed and the court affirmatively found that there was always adequate, suitable siding on the site available to appellee. Therefore, no damages can be awarded against the supplier.

B. The figure of $39,000.00 used as the cost of installation of siding, adopted by the court in Finding of Fact No. 32 was based upon pure speculation. At most, the added cost referred to second-floor siding only, not to just a third-floor siding. Hence this figure could refer only to one-third of the 1300 sheets the court mentions and the result must be accordingly reduced.

C. There is no evidence whatever in the record of the man hours needed to *apply* a sheet of plywood siding to support the finding of three hours per sheet used in Finding of Fact No. 33. The only evidence at all related was adduced by appellant in showing certain of appellee's back charges to be inflated and fraudulent, and this was that it took three hours to *remove and replace* a sheet of plywood. Therefore, no more than 1½ man hours per sheet could be considered for applying siding where price removed is not required. Therefore, the final figure must be further reduced.

2. General Observations:

The court is urged to remember that except for a couple of days in July, 1961, when Mr. Lewis, a representative of appellant visited the job site, appellant had no observer whatsover on this construction job and *all of the pertinent facts are within the peculiar knowledge of the ap-*

pellee. Time and again it is pointed out that the testimony of appellee's witnesses did not correspond to its more dependable records, e.g., its daily reports (Ex. 46). This prompted the trial court to make a specific finding resolving the conflicts in favor of the records (Finding No. 20, R. 304). The conflicts were mainly presented by Mr. Billimek, appellee's job superintendent (St. Supp. 33 and 37.38).

3. Sufficient Siding Available at All Times:

The trial court has carefully set out the evidence in Finding of Fact No. 9 through 17 showing how much good siding the appellee had on hand at all times, how much it needed for each building, and that appellee did not complete enclosure of buildings it obviously had ample siding to cover (Tr. 300-302). These findings show that while appellee had more than *enough siding for three buildings,* 846, 847 and 848 from the very beginning, it had *finished none* of them by the time the second shipment arrived on August 3rd. With the second shipment it had *enough to finish five buildings,* 846, 847, 848, 855 and 875, but by the arrival of the third shipment on August 23rd, it had *only completed one small building,* No. 848. With the third shipment, more than *enough siding was available to complete seven buildings,* all except one, and yet it was a full week thereafter before the *second* building was completed. The trial court concludes this complete analysis by finding:

> "The evidence does not establish what delay, if any, lack of suitable plywood may have caused plaintiff (appellee)." (Tr. 303)

Appellant had a duty to supply suitable siding. Appellee could not be damaged unless suitable siding was not supplied to fill its needs (regardless how much after the *contract* date the siding might have been delivered). The only reason appellant could be blamed for any change in siding application method would be because the siding was not there to use when needed. It is the appellee's burden of proving this element of its claim and it has signally failed to do so. While its oral testimony bemoans a constant lack of siding, appellee's reliable records of its construction progress (Ex. 46) prove the contrary (R. 303-304, Finding No. 20).

Bearing on the practicability of this tilt-up method it is important to consider that the wind at Ft. Greeley was vicious. A whole concrete block wall blew down on Bldg. 855 (Ex. 46, July 10, 1961). Building No. 875 was blown out of plumb on September 11, 1961 (Ex. 46). Added bracing of the buildings was required because of "the high winds at Greeley" lest they be blown down (Tr. 189). Repeated reference to high winds is found in the Daily Reports (Ex. 46). A framed wall without siding is much like an airplane wing without fabric on it. A framed wall with siding applied is like a completed wing. Although denied by appellee, it is submitted that tilting up a wall frame with the sail area of siding added, in this wind-swept area, would be foolhardy. It is recognized that this conclusion is supported only by the above inferences and not otherwise in the testimony. The logic of the position is so compelling that this writer could not omit it from this brief.

4. Comparison Figure of "Three Times" Is a Guess and Refers to Second Floor Siding Only

The siding affected by the tilt up method was the second floor siding only. This much of Finding of Fact No. 32 (R. 309) is correct. The second floor siding was only one-third of the siding on each building. Mr. Billimek, appellee's job superintendent, admitted:

"Q. Now on the construction of buildings, there are three basic tiers of siding, isn't that correct?

"A. Yes. One is only five feet.

"Q. The bottom is five feet, and the next two are full eight foot sheets?

"A. Yes." (Tr. 303-4)

* * *

"Q. At any rate, if you tilted up the upper story on both sides and the ends, if you did tilt up the ends, *you would have only a third of the siding on that building, would you, the number of sheets?*

"A. That's correct." (Tr. 305)

Mr. Billimek also admitted that the tilt-up procedure was used for wall frames *without siding*, and that he had used his special jacks for that purpose (Tr. 315).

The court obtained its cost comparison figure of "three times" from the following testimony, wherein appellee's counsel was questioning Mr. Billimek about a percentage of added cost due to siding delivery (Tr. 247-248):

"Q. The next question is, what is that opinion?

"A. The inefficiency in labor due to the job not being organized, and so the crew in the mornings when

they go to work didn't know what they were going to do. They just put their overalls on and worked instead of being told what to do — that would be roughly 20%.

Then as far as the siding being applied the way we had to, you know—if we could have applied the siding the way we had it planned, in order to have the walls laying down and applying the siding, the way we had to do it cost us about three times as much. Instead of $12.00 a square foot, it probably cost us close to $40.00 a square foot."

Note the court's doubts about this estimate of an opinion, i.e., speculation, at the time this testimony was received and its admission "for whatever it's worth" (Tr. 247).

The reference to $12.00 per square foot and $40.00 per square foot further shows that Mr. Billimek was merely pulling figures out of the air. At the lower rate, $12.00 per foot, it would have cost $821,000 to put on the original 1856 sheets which were 4 ft. x 8 ft., or 32 sq. ft. each. At the $40.00 rate, the figure would compute to $2,944,000.

THIS "THREE TIMES" FIGURE SHOULD HAVE BEEN TOTALLY REJECTED. IT IS NOWHERE SUPPORTED BY FACT OR EXPLANATION. But even in the court's use of it, it is submitted it was never intended to modify more than the siding affected by the loss of the tilt-up method, i.e., the one-third of the siding that covered the second floor walls. There of course were not 1300 second floor sheets that could have been affected by this alleged change in method. The court found that the appellee used this tilt-up process on the first three

buildings, Nos. 846, 847 and 848 (R. 309, Finding No. 32). These three buiildings had a total of 488 sheets on them when completed (R. 301, Finding No. 13 and R. 202, Finding No. 15). The remaining five buildings, Nos. 855, 875, 876, 877 and 821, including all three tiers from the ground up through the second floor, contained approximately 1300 sheets (a precise total from Finding No. 13, R. 301, indicates 1334 sheets).

Again, only second floor siding was to be applied to the "walls laying down" (Tr. 248). If this factor of "three times" was to be used at all it should have applied at most to the one-third of the 1300 sheets that went on the second floor walls of these five buildings.

5. There Is No Evidence of the Time to *Apply* a Sheet of Plywood Siding

The figure of *"Three man hours per sheet to apply a sheet of plywood"* as stated in Finding No. 33 (R. 309) is nowhere found in the evidence. There is no evidence from which it can be inferred. *There is a total failure of evidence to support this finding.*

The only statement conceivably related is found in cross-examination colloquy between Mr. Billimek and appellant's counsel while delving into a series of back charge claims being made by appellee, as set forth in Exhibit 45. These claims totalled some $45,000.00, nearly $40,000.00 of which is for some 4,360 man hours allegedly expended to "remove and replace defective siding"—*siding which the appellee was subsequently proved to have wrongfully put up in violation of the government rejec-*

tion and stop order.

It having been initially established by interrogatories and its own testimony that appellee could claim removal and replacement of at most 700 sheets (R. 75, St. 161) appellee's superintendent was queried on a reasonable time for removing and replacing a sheet. Some 4360 hours for this seemed high indeed. The following testimony was elicited (Tr. 331-333):

"Q. Mr. Billimek, getting back to what *might be a reasonable time for removing and replacing a sheet of siding,* let's assume you have a five man gang. One teamster, he can drive the truck and so forth, and the others are carpenters, and one is a foreman. *How many sheets of plywood could that group remove and replace in a day*?

"A. I could describe it better by wall area. I should say that group with that type of building should probably cover 20 or 25 feet down one side of the building.

"Q. 25 feet down one side of a building?

"A. 20 or 25 feet. It wouldn't be 25, it would be 24.

"Q. Well how many sheets during a 9 hour period, how many sheets could they *put up and remove*?

"A. Well, there are half sheets, and I don't know how many sheets it would take. You are talking about sheets. Maybe it would take a small piece that would have to be cut and fitted. It takes longer to put that on than a full sheet. I think they should cover that building between 20 and 25 feet down one side, either the side of the building or the back. The ends would be faster as there are no windows, but that's an average on the side of the building.

"Q. How long would it take to do one end of a building?

"A. They should complete one end, that crew that we mentioned awhile ago should complete one end in one day. Of course the ends are simple, they are all full sheets. And that's under good working conditions.

"Q. Pardon.

"A. That's under good working conditions.

"Q. That's 18 sheets on the ends, plus the other material, is that right?

"A. Yes.

"Q. So that four men in nine hours, maybe they could do—

"A. We were talking about five men, weren't we?

"Q. Let's add another one in there then. Let's say five, and that would be about 45 man hours and we should do at least 15 sheets. *That's about three man hours per sheet. That's a pretty healthy estimate, isn't it, Mr. Billimek*?

"A. Under certain conditions it's not bad.

"Q. How bad was it?

"A. It was pretty cold during September. We were still getting plywood in, you know. Just before the 1st of October.

"Q. How about the last two weeks of August? That's not bad weather, is it?

"A. August isn't too bad, no. I mean August is considered a good month up here."

This testimony showed that even with the appellee trying to charge the appellant for removing and replacing siding it put up in violation of the government order —only 2100 hours (700 sheets x 3 man hours per sheet) could be justified for that activity, not 4360 as appellee claimed in Exhibit 45. A further comparison with appel-

lee's daily reports (Ex. 46) proved these back charges to be largely fraudulent fabrications. There was no removal and replacing of any siding, on *any* building after September 5th (R. 304-305, Finding of Fact No. 22). Yet these bogus back charges described week after week of "removing and replacing defective siding" on through October 9, 1961 (Ex. 45).

When challenged to refute this evidence of fraud, appellee had to admit (Tr. Sup. 60-61):

> *"Next, what about the back charges? Well, we recognize, Your Honor, the problem inherent in supporting those back charges. We feel that the explanation is for them that they are improperly reflected, actually, as removing and replacing siding, and by an inarticulate description so indicated."*
>
> * * *
>
> *"We feel with respect to those they were not actually removing and replacing siding. . . ."*

A beautifully prepared "record" in minute detail—names, hours, rate, overtime, etc.—suddenly becomes "inarticulate" when found to describe events that never took place.

It is true that evidence is generally admitted for all purposes. It is conceivable that evidence which proves a party is making a fraudulent claim on one issue could be used to aid that same party in another issue. BUT IT IS ABSOLUTE ERROR FOR THE TRIAL COURT TO *CHANGE THE DEFINITION* OF THIS "THREE MAN HOURS PER SHEET" FROM THE TIME REQUIRED TO REMOVE AND REPLACE SIDING TO THE TIME

REQUIRED TO PLACE IT ONLY. Under these particular circumstances it seems especially unjust.

A most charitable inference in favor of appellee would be that the two processes of removal and re-application are equivalent and hence each would require 1½ man hours per sheet. On the other hand, appellee was in exclusive possession of all the facts, appellee had the burden of proof, appellee obviously spent time producing bogus records on man hours engaged in siding endeavor, but produced no evidence on this critical point. IT WOULD BE IN NO WAY UNJUST OR UNFAIR TO REFRAIN FROM STRAINING THIS EVIDENCE IN APPELLEE'S FAVOR AND TO HOLD THAT APPELLEE SIMPLY FAILED TO ESTABLISH ITS CLAIM *IN TOTO.*

6. Cost Bill of Appellee

In the manner that is typical of the style of appellee in making a claim, this cost bill for $12,835.38 (R. 327-328) for a seven-day trial is outrageous. One is tempted to review it with some levity now—but only after recovering from the shudder of what would have happened if prompt objection had not been made. Could this have resulted in a judgment for that sum?

Look at some of the items listed. "William G. Jones, $4,603.95"—what does this mean and why try to charge appellant for it? David Rose, part of a $699 motel bill, and $1700.00 for "services." This was claimed for the man who was indicted for fraud against the government, after an F.B.I. investigation, *on this very job,* when he tried

to pass one coat of paint as compliance with specifications (Tr. 40). He never took the stand.

The judgment was filed on November 4, 1966 (R. 326) and the original cost bill ten days later, on November 16th (R. 327, 328). The applicable court rules provide:

Rule 15. Costs.

> "(1) The party in whose favor . . . shall . . . serve . . . and file . . . *in no event later than ten* (10) *days after notice of the entry of the decree or judgment*) his bill of costs. . . .
>
> "(2) Such bill of costs shall distinctly set forth each item thereof so that the nature of the charge can readily be understood. . . .
>
> "(3) . . .
>
> "(4) . . . The rate for witness fees, mileage and subsistence is fixed by Sec. 21.3 of Chapter I, Title 28 of the Code of Federal Regulations."

CFR Sec. 21.3 provides for the following basic rates specifically for the District Courts of Alaska:

Witness attendance—$4.00 per day.

Subsistence if away from home—$15.00 per day.

Travel—cheapest first class rate if by common carrier.

The $12,835.38 claim is not minimal compliance with the above rules. It should be treated as a nullity. Subsequent attempts to amend it, pare it down, occurring after the ten days for filing thereof should not be permitted to cure ts basic defects. The objections made by appellant's counsel (R. 343-345) should have been granted and the cost bill stricken as frivilous.

8. Applicable Legal Principles

The Trial Memorandum of appellant (R. 129-136) and the appellant's Memorandum in Support of Conclusions of Law (R. 279-287) sets forth the law applicable to this situation. Only short excerpts will be repeated here reaffirming the basic legal principles which apply.

Appellee, as plaintiff, had the burden of proof of its claims. As stated in *U.S. v. Griffith, Gornall & Carman, Inc.*, 210 F. Supp. 11:

> "The fact of damage, however, must be proved to a certainty. Mathematical exactness as to the amount is not required but the evidence must form a basis for a reasonable approximation. *The court must have before it such facts and circumstances to enable it to make an estimate of the damage based upon judgment, not guesswork.*
>
> * * *
>
> "The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable."

The appellee knew from the time of arrival of the first shipment, in May, 1961, that it was in all probability defective, and kept this fact from the government inspectors until they began to apply the material. In so doing, all possible re-order time between May 29th and July 3rd was lost (Tr. 333, 334). They wrongfully continued applying the material when told to stop. This certainly violates the rule as announced in *Anchorage Independent School District v. Stevens*, 370 P.2d 531 (Alaska Supreme Court,

April 3, 1962), wherein it is stated:

> "It is a cardinal rule in the law of damages that a plaintiff, with an otherwise valid right of action, is denied recovery for so much of the losses as are shown to have resulted from failure on his part to use reasonable efforts to avoid or prevent them."

As also stated in *Razey v. J. B. Colt Co.*, 106 App. Div. 103, 106, 94 N.Y.S. 59:

> ". . . Where the plaintiff seeks to recover damages for a breach of general warranty, which are usually the difference between the value of the thing as it is in fact and as it was warranted to be, the question of negligence does not enter; but, where he seeks to recover consequential damages he should not be permitted to recover for his own negligence. It has frequently been said that such damages are recoverable as may reasonably be said to have been within the contemplation of the parties. Warranty is not insurance, and there is nothing in this contract to indicate that either party supposed the defendant was to answer for the plaintiff's carelessness."

CONCLUSIONS

There was always adequate siding on the job commensurate with appellee's construction progress. This means appellee had the choice to use any method of siding erection it desired. Appellee indicates it did not use the second story siding method it allegedly anticipated. It may have decided that prudence was a virtue, and after Building 855 blew down on July 10th it abandoned any thought of the tilt up method. No damages should have been awarded appellee for the alleged revision of method.

If the appellee merits any award, the following must be considered:

The record indicates that a figure of three hours was for *removal and replacement* of a sheet, not merely the *placement* of a sheet (St. 331-333). The witness giving this estimate admits this is a healthy estimate except under conditions of extreme cold, which did not prevail prior to the closing in of the buildings. It is submitted that the time for placement of a sheet, as opposed to three houses for the removal and replacement, could not exceed one and one-half hours, giving plaintiffs all benefit of inference. It would follow from this element alone that the $26,000.00 item of damages in Finding No. 33 should initially be reduced to $13,000.

Furthermore, it appears in the record that Mr. Billimek (at St. 248) was estimating a factor of three when talking about the upper tier of siding, the only tier that was to be applied to the frame while lying flat and then tilted up (St. 305). The other two tiers, being that covering the first floor walls and the short tier covering the basement above ground (St. 303-304) were in fact applied in the manner originally intended. Thus, since only one-third of the remaining 1300 sheets took additional time to install, the factor should be applied only to 433 sheets and the $13,000.00 award further reduced to $4,333.00.

The trial court had this case under advisement for some 14 months before it rendered its decision. After some four months the court indicated its disposition to make an award for appellee but indicated serious difficulties with

finding an amount.

Ten months later, the trial court made its award which was large enough to make appellee the "prevailing party." Appellee's entire argument on May 26, 1966 is in the Transcript (Tr. Supp. 1-39, 56-65) and no mention of this award formula is even suggested. The same is true of appellee's description of its damage given in answers to interrogatories (R. 81-83, 111-115).

This record presents *no* legally sufficient reasons for awarding tens of thousands of dollars to this non-damaged party. The judgment should be reversed with the deletion of the damage award, costs and attorneys' fees in favor of appellee. The cross-claim award in favor of appellant for which there is no contest should be affirmed.

Respectfully submitted,

CASEY & PRUZAN
BY JOHN F. KOVARIK
Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN F. KOVARIK
Of Attorneys for Appellant

APPENDIX OF EXHIBITS

Only three of the Exhibits were made a part of the record:

Exhibit No.	*Description of Exhibit*	*Offered*	*Admitted*
Plaintiff's 1-E	Schedule Submitted to Government	Tr. 249	Tr. 249
Plaintiff's 1-F	Billimek Schedule	Tr. 108	Tr. 108
Defendant's G	Schedule Approved by Government	Tr. 250	Tr. 251

Because of their size, Exhibit 45, Back Charges, and Exhibit 46, Daily Reports, were not made a part of the record on the recommendation of the Clerk of Court who suggested they be reviewed by the court in their original form with reproduction.